FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

Nos. 39 and 309

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Petitioner (Appellant)

v.

OSSIE McCRAY, Respondent (Appellee)

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Petitioner (Appellant)

v.

ALBERT BAREFIELD, Respondent (Appellee)

PETITION OF THE LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE FOR A REHEARING

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IN THE

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OCTOBER TERM, 1933

Nos. 89 and 509

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE, Petitioner (Appellant)

v.

OSSIE McCRAY, Respondent (Appellee)

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE, Petitioner (Appellant)

v.

ALBERT BAREFIELD, Respondent (Appellee)

PETITION OF THE LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE FOR A REHEARING

PETITION FOR REHEARING

Comes now the above-named Petitioner, the Life & Casualty Insurance Company of Tennessee, and presents this, its petition for a rehearing of the above entitled causes, and in support thereof, respectfully shows:

Neither party presented the points decided in brief or argument and neither this Court nor any other Court has ever raised them as relating to insurance penalty statutes. They are raised by the Court of its own motion and the authorities are the result of its own investigation. This decision is directly opposed to *St. Louis, Etc., Railroad Company* v. *Kane*, 224 U. S. 350, and *Pacific Mutual Life Ins. Co.* v. *Carter*, 92 Ark. 378, and not having been heard on these points we file this petition.

In disposing of this case (*McCray*) this Court said:

> " 'Penalty' is a term of varying and uncertain meaning. There are penalties recoverable in vindication of the public justice of the state. There are other penalties designed as reparation to sufferers from wrongs. *Huntington* v. *Attrill*, 146 U. S. 657, 668; *Brady* v. *Daly*, 175 U. S. 148, 154, 157; *St. Louis, I. M. & S. Ry. Co.* v. *Williams*, 251 U. S. 63, 66; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 103. *One who refuses to pay when the law requires that he shall, acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal.* It is no answer in such circumstances that he has acted in good faith. 'The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury *subsequently* estimates it, some matters of degree.' *Nash* v. *United States*, 229 U. S. 373, 377. Reparation may still be due, for all his good intentions, yet reparation within bounds. It is all 'a question of more or less.' *Sexton* v. *Kessler*, 225 U. S. 90, 98. The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open. *Ex parte Young*, 209 U. S. 123; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 661, 662. On the other hand, the penalty may be no more *than the fair price of the adventure.* *St. Louis, I. M. & S. Co.* v. *Williams*, supra, p. 66. *In that event, the litigant must pay for his experience, like others who have tried and lost.*"

This language unmistakably shows that this Court has held that whether or not attorneys' fees and penalties may be assessed under the Arkansas Penalty Statute, involved in this case, depends solely upon the fact that the litigation has resulted in a verdict against the Company. In other words, whether or not the attorneys' fees and damages may be as-

sessed depends upon the *end of the law suit.* This Court has entirely overlooked the insistence of your petitioner that whether or not attorneys' fees and damages may be assessed must be judged *solely* from the claim at the *time the demand is made, and before the suit is filed.*

It will be noted that this statute expressly provides that if the Company "shall fail to pay the same within the time specified in the policy, *after demand made therefor*", it shall be subject to have included in the final judgment attorneys' fees and damages. This contemplates that, before the damages and attorneys' fees may be awarded, the claimant shall make *demand* upon the company for payment, which necessarily carries with it the idea that he must at the *time of demand* present a *claim* setting out facts showing that the company *owes the amount demanded.*

If the claim presented, at the *time demand is made,* does *not on its face* show that the company *owes it,* the Fourteenth Amendment forbids the award of attorneys' fees or damages for a refusal to pay it.

The law contemplates that before penalties are awarded, the company must have an opportunity to pay the claim.

There is no real relation between the claim as demanded and the fact of final judgment on the policy against the company. The company may *not owe* the claim *as demanded,* yet a recovery may be had on the policy on an entirely different state of facts. When a claim is demanded showing that the company does not owe it, the law does not hold the claimant to the claim as demanded or require the claimant to file another

claim before bringing suit. It permits him to bring suit and recover judgment on an *entirely different state of facts.*

The company is not given an *opportunity* to pay the claim upon which the *judgment is rendered.*

The law even permits the claimant to *deny entirely* the facts in the claim demanded and to recover judgment on the policy, without making another demand or amending the one on file with the company.

This point is illustrated by the Tennessee case of *Robertson v. Insurance Company,* 6 Tenn. App. 59, where the policy provided that suicide within one year defeated recovery. Demand was made on a claim showing suicide within one year and payment was refused. Without amending the claim or filing a new claim showing a different state of facts, suit was brought under an allegation of facts totally denying the statement that the assured committed suicide, which was a complete denial of the facts stated in the claim as demanded. A recovery was had on the ground that the claimant was not bound by the statements in the claim at the time of the demand, but could shift his ground and make a total denial of such facts. Although a judgment was recovered, the penalty under the Tennessee statute was denied because the claim, as demanded, showed no liability.

The law on this subject is well stated in *Bacon on Life and Accident Insurance,* Fourth Edition, Section 560, as follows:

> "Proofs of Loss as Evidence.—The preponderance of authority is in favor of the view that proofs of loss are admissible in evidence for the sole purpose of showing

that the requirements of the policy concerning them have been complied with. But, although this is true, the *Supreme Court of the United States* has said that preliminary proofs, presented in compliance with a condition of the policy, are admissible as prima facie evidence of the facts therein against insured and on behalf of insurer. And if not contradicted require, if they show a breach of warranty or conditions of the policy, a judgment for defendant. These last mentioned cases and others hold that the statements made by the assured in the proofs of loss *are admissions*, and may be considered by the jury for what they are *worth*, and the modern rule is probably that the proofs of loss furnished by the assured are not only evidence that the condition of the policy requiring them has been complied with, but are also to be regarded as admissions and prima facie evidence of the facts therein stated. But the party furnishing them may show that statements in the *proofs of loss were erroneous* or *inadvertently made*, and the mistake can be shown *by parol.*"

The law is, therefore, clear that a claimant may make demand on one state of facts and after refusal is had and without making another demand, recover on the policy on an entirely *different state of facts.*

While this Court, as shown by the above authorities, permits a claimant to recover upon an entirely different state of facts than set out in his demand, it held in *St. Louis Railroad Company* v. *Wynne*, 224 U. S. 360, 56 L. Ed. 801, as shown by the following language, that the Fourteenth Amendment forbids the award of attorneys' fees and damages under the Arkansas penalty statutes, where the *claim as demanded* showed that it was *not* owed at that time:

"The owner of two horses which were killed within the state by a train of a railway company served upon the

company a written notice demanding damages in the sum of $500. The company refused to pay the demand, and after the expiration of thirty days the owner brought suit in a court of the state to recover his damages, alleged in the complaint to be $400. A trial to a jury resulted in a verdict for the owner, assessing his damages at the amount sued for, and the court, deeming the statute applicable, gave judgment for double that amount and for an attorney's fee of $50. The company objected that the statute, as thus applied, was repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, but the objection was overruled, and on appeal to the supreme court of the state the judgment was affirmed. 90 Ark. 538, 119 S. W. 1127, 17 A. & E. Ann. Cas. 631. The case is here on a writ of error to that court.

"It will be perceived that, while before the suit the owner demanded $500 as damages, which the company refused to pay, he did not in his suit either claim or establish that he was entitled to that amount. On the contrary, by the allegations in his complaint he confessed, and by the verdict of the jury it was found, that his damages were but $400. Evidently, therefore, the prior demand was excessive and the company rightfully refused to pay it. And yet, the statute was construed as penalizing that refusal and requiring a judgment for double damages and an attorney's fee. In other words, the application made of the statute was such that the company was subjected to this extraordinary liability for refusing to pay the excessive demand made before the suit.

"We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law. It does not merely provide a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special treatment by the legislature, as was the case with the statute con-

sidered in *Seaboard Air Line R. Co.* v. *Seegers*, 207 U. S. 73, 52 L. Ed. 108, 28 Sup. Ct. Rep. 28, but attaches onerous penalties to the nonpayment of extravagant demands, thereby making submission to them the preferable alternative Thus, it takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. *Plainly this cannot be done consistently with due process of law.* And, in principle, the supreme court of the state has so held since its decision in this case. In *Pacific Mut. L. Ins. Co.* v. *Carter*, 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, that court had occasion to consider a statute of the state providing that if a loss under a policy of insurance was not paid within the time specified, 'after *demand made therefor*', the company should be liable, in addition to the amount of the loss, to 12 per cent damages and a reasonable attorney's fee. An insured demanded in payment of a loss under such a policy the sum of $1,666.66, which the insurance company refused to pay, and in a suit on the policy, wherein it was found that the loss was but $1,444.44, the insured was awarded the statutory damages and an attorney's fee. That part of the judgment was reversed, and it was said:

" 'But the act makes the company liable for failure to pay the loss *"after demand made therefor."* The statute thus *contemplates that there shall be a demand.* A recovery for penalty and attorney's fee cannot be had when complainant makes demand for more than he is entitled to recover. It could never have been the purpose of the legislature to make the insurance companies pay a penalty and attorney's fee for *contesting a claim that they did not owe.* Such an act would be unconstitutional. The companies have the right to *resist the payment of a demand that they do not owe.* When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorneys' fee is for the benefit of the one who is only seeking to recover after demand what is *due him under*

the terms of his contract, and who is compelled to resort to the courts to obtain it'."

We note that this Court in the above decision quotes with approval from the Arkansas case of *Pacific Mutual Life* v. *Carter*, 92 Ark. 356, in which the Court was considering the Arkansas penalty statute here involved and held that where the company did *not owe* the claim *as demanded*, attorneys' fees and damages could not be awarded under the statute, and that a different construction would render the Act unconstitutional under the Fourteenth Amendment.

The Court will see that the proposition decided by this Court and the Arkansas Supreme Court in the above cases is exactly the one which petitioner is now insisting upon.

Accordingly, if these two cases are to be followed, the test to be applied to the present case is whether or not at the *time of demand* your petitioner *owed* the claim as set out in the demand.

The claim as demanded showed that the assured committed suicide within one year from the date of the reinstatement of the policy.

Your petitioner is a Tennessee corporation located at Nashville, Tennessee, and prior to the time this policy was issued the Tennessee Supreme Court in the case of *Insurance Company* v. *Galbraith*, 115 Tenn. 478, held, as shown by the following language, that where a policy lapsed and was reinstated its date thereafter should be calculated from the date of the *reinstatement* and not the date of the policy:

"This it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question, and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy has neither a legal nor an equitable claim on the company. By his failure to comply with the condition upon which it could be kept alive he has ipso facto forfeited all rights under the policy. As to him it is as if it *had never been written.* If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a *new assurance—a new contract*—as if the policy *then was for the first time issued.* If this be its nature, then it must operate in the future from the *date of its reinstatement*, and whatever might be its *original date*, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract."

This Court and both the Tennessee and Arkansas Supreme Court recognize the rule of law to be that the decision of the Supreme Court of a State interpreting the provision of a policy becomes a part of each policy thereafter issued to the same extent as if copied in full therein.

We quote from the following cases as sustaining this rule: *Edwards* v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 796:

"It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement."

Armour Packing Co. v. *U. S.*, 82 C. C. A. 135 (8th Circuit), 153 F. 1, Vol. 14, L. R. A. (N. S.), page 415:

> "But the contention that the contract was valid, and that its performance was enforceable after the higher rates were filed and published, ignores a basic rule of the interpretation of agreements and a material part of the contract. That rule is that all laws in existence when an agreement is made necessarily enter into and form a part of it as fully as if they were expressly referred to or incorporated into its terms. *Von Hoffman* v. *Quincy* (United States ex rel., *Von Hoffman* v. *Quincy*), 4 Wall. 535, 550, 18 L. Ed. 403, 408; *Rees* v. *Watertown*, 19 Wall. 107, 121, 22 L. Ed. 72, 76; *Edwards* v. *Kearzey*, 96 U. S. 595, 601, 24 L. Ed. 793, 796; *Seibert* v. *Lewis* (*Seibert* v. *United States*), 122 U. S. 284, 295, 30 L. Ed. 1161, 1165, 7 Sup. Ct. Rep. 1190; *Southern R. Co.* v. *Bouknight*, 30 L. R. A. 823, 17 C. C. A. 181, 185, 25 U. S. App. 415, 70 Fed. 442, 446."

Therefore, under these authorities the interpretation placed upon this policy in the *Galbraith* case became as much a part of the policy as if it was copied in full therein, and the policy, therefore, provided on its face that if it lapsed and was reinstated and suicide occurred within one year from the date of the *reinstatement*, no recovery could be had.

The claim at the time of demand showed that the assured committed suicide within one year from the date of the reinstatement, and, accordingly, was *not owed* by your petitioner, with the interpretation of the *Galbraith* case read into the policy, as must be done under the law.

Accordingly, the claim as demanded at the time of the demand was not owed by your petitioner, and the Fourteenth

Amendment as interpreted by this Court in *Railroad, etc.* v. *Wynne,* supra, and by the Supreme Court of Arkansas in *Pacific Mutual Life* v. *Carter,* supra, forbade the award of attorneys' fees and damages, and it is clear that the decision in the present case cannot be upheld unless these cases are either overruled or ignored.

There is yet a stronger reason why this claim at the time of the demand was not owed and why it could not be paid by the company, and that is, under both the Tennessee and Arkansas statutes payment *was absolutely forbidden.* If the company had paid it, it would have violated the laws of both States, been guilty of a misdemeanor and been subject to have its license revoked under both statutes.

The statutes of both States expressly set out *what claims* shall be paid and what claims *shall not be paid* and then expressly provide that any claim not legal thereunder must not be paid.

Both of these statutes expressly provide that no claim shall be paid (a) unless it is owed under the *written policy,* and (b) no payment can be made that constitutes a *discrimination* between insurants of the same class.

In Tennessee, the statute is as follows (Chap. 160, Acts of 1895, Sec. 28) :

> "*Be It Further Enacted,* That no life insurance company doing business in Tennessee shall make or permit any distinction or discrimination between insurants of the same class and equal expectation of life in the amount or payment of premiums, or rates charged for policies of

life or endowment insurance, or in the dividends or other benefits payable thereon, or any other of the terms and conditions of the contracts it makes; nor shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon or any valuable consideration or inducement whatever, not specified in the policy contract of insurance. It shall be unlawful for any insurance company or agent to pay or allow, or offer to pay, or allow as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any *valuable consideration* or inducement whatever, not specified in the policy contract of insurance. (As amended by Ch. 176, Acts of 1919): 'The penalty for violation of the foregoing section shall be the same as provided in Section 29, Chapter 160, of the Acts of 1895.' Ch. 176, Acts of 1919."

In Arkansas, the statute is as follows (Section 322 of the *Digest of Insurance Laws of Arkansas*, being Sec. 10 of the Act 493 of 1921):

"It shall be unlawful for any life insurance company doing business in this State to *permit distinction* or *discrimination* between *individuals of the same class or of equal expectaton of life* in the amount of payment of *premiums, rates, dividends, benefits, terms or conditions* of contracts of life or endowment insurance; nor shall any life insurance company, or agent thereof, make any contract except as is plainly expressed in the policy of insurance; nor shall any life insurance company, officer or agent thereof, pay, offer to pay, directly or indirectly,

as an inducement to insurance, any rebate of premiums on the policy of insurance, or any other thing of value whatsoever not specified in the policy contract. Any company or agent violating the provisions of this Section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and the Commissioner shall cancel the right of the company, or agents, convicted to transact business in this State for a period of one year. Provided, the company shall not be held liable under this Section for any act of its agents unless such act was authorized by one of its officers, State managers, State or general agents.—Sec. 10, Act 493, of 1921."

It will be noted that the legal effect of both statutes are the same and both use almost the same identical language.

Each other State has statutes of the same legal effect and in almost the identical language.

That this is true is due to the *nature* of insurance and the *relation* which it bears to its policyholders.

The business of insurance is in a legislative straight-jacket. Insurance companies have no rights of *free agency* such as are enjoyed by other corporations and individuals. They are not permitted to do business unless they have a certain amount of assets, free from all debts, which under the statutes of the several States is generally placed at $100,000.00. They are not permitted to invest its assets except in a certain class of securities. They are required to make annual reports to the Insurance Commissioner of each State, and, if it is found that their assets had not been invested as authorized or that

they do not have the stipulated amount of assets above all liabilities invested as the law requires, they will be wound up as insolvent concerns.

In order that they may have level premiums, they are required to charge each policyholder an amount *more than sufficient* to pay current losses, and this extra amount is required to be carried and kept intact as a reserve and as a *liability* against the company. This creates the reserve fund which is the *absolute property* of the policyholder and not of the company. The policyholder, as a matter of right, may withdraw his part of this fund at any time or may borrow it by giving his note secured only by the policy. The assets of the company consist almost entirely of these reserves owned by the policyholders and, where the company has a capital stock, it is only required as a margin of safety, inasmuch as it is known that some of their assets will prove worthless, and the capital stock is required to protect the policyholders against this deficiency.

Insurance is made possible by the phenomena of human experience, that so many people will die, and so many accidents will happen under given circumstances, and this has created the profession of insurance actuaries who graduate from universities in their profession in the same manner as do lawyers and doctors and members of other professions.

Mortuary and accident tables have been prepared by them showing exactly what premiums must be paid under given conditions in order to mature the policy and it is no more possible to vary this phenomena of human experience, upon which these tables are based, than it is to change the laws of gravitation or the ebb and flow of the tides. One is as

much due to *natural causes* as the other, and *no decree of a Court or Act of a legislature* can change their operation. Accordingly, each policyholder receiving the same benefit is required to pay the same premium, which will only pay for the benefits received. Accordingly if one policyholder is permitted to recover more from the reserve fund than he has paid for, it means that some other policyholder will receive less than he has paid for. For this reason, each State has passed laws almost identical with those of Tennessee and Arkansas copied above. These laws have for their object the preservation of the interest of each policyholder in the fund *held by the company* but *owned by the policyholders* and to assure that no policyholder will be discriminated against in the distribution of this common fund, belonging to *all the policyholders.*

In order to assure that no Company shall violate the natural laws governing the science of insurance, Tennessee and Arkansas and each other State have adopted a uniform code of laws, identical in legal effect and almost identical in words, prohibiting any insurance company from conducting its business in any other manner than required by these natural laws governing the number of deaths and the number of accidents under given circumstances, as shown by the insurance tables.

The science of insurance could not be carried out on a level premium basis, which is almost universally used, and which governs the policies involved in these cases, unless more were charged than necessary to pay current losses, thereby creating a common fund, called insurance reserves and belonging absolutely to the policyholders in proportion to the amount paid in under their policy contracts.

The assets of insurance companies consist almost entirely of these insurance reserves. If these insurance laws were not uniform and one State permitted an insurance company to pay out of this common fund more than the policyholder was entitled to under his written contract, this would destroy entirely the scientific scheme of insurance.

Each policyholder is given a policy, which shows his proportionate ownership in this fund and the manner of his participation, and all these laws of both States herein mentioned became a part of each policy to the same extent as if written in full on the face of each policy.

As a necessary incident to these laws, it is necessary that the rights of each party be reduced to writing and that no discrimination shall be permitted. Accordingly, the above statutes of Arkansas and Tennessee expressly provide that the policies shall be in writing and that no discrimination shall be had between policyholders of the same class. To enforce these provisions, in the same statutes, it is expressly provided that the payment to a policyholder not under the written contract is a misdemeanor and subjects the offending company to punishment as a misdemeanor to have its corporate existence ended and its license to do business cancelled. In order that the Insurance Commissioners of each State may judge whether or not these policies are drawn according to the mortuary and accident tables and the rights of each policyholder safe-guarded the statutes of the different States require that each policy shall be filed with the respective Insurance Departments *before issued* in the State and each State has provided actuaries to examine each policy to see that its premium is adequate for the liability assumed and that its provisions are fair to the public and in general that

it complies with the natural laws of insurance based on the death of individuals and the happening of accidents. The Arkansas law on this subject is as follows:

> "All forms of policy contracts of life, health and accident companies issued in the State, shall first be submitted to the Commissioner, and same cannot be issued in this State until they have been submitted to and received the approval of the Commissioner. Provided, the Commissioner shall approve any policy forms provided for or made legal by the laws of the State."

The Tennessee laws on this subject will be found in Tennessee Code, Section 6182.

This Court will clearly see that what a company charges as a premium, the benefits that it pays and its terms generally are not left to any extent to the companies but are absolutely fixed by the law and must be approved by the Insurance Departments before the policy can be sold. These policies are, therefore, *statutory*, are inflexible in their nature and the insurance companies have no right under severe penalties, either to *sell a different policy, or to pay out claims under a policy not authorized by the written terms of the policies as approved by the Insurance Department.* If this could be done, the effects of these laws would be defeated.

Therefore, an insurance company has no freedom of choice or judgment as to what capital it shall have or how its assets may be invested, or the policy *contracts it issues*, or the manner and means of their enforcement, or application or what claims it should pay and what it should reject.

The assets do not belong to the company and it has no control over their distribution. All of these things and matters are fixed by the statutes of the various States and the administration of these statutes are in the hands of the Insurance Commissioners of the various States. These State officials are given summary powers over the companies whenever any of these laws are not fully complied with.

These legal propositions have received judicial consideration in the following cases:

This exact question was before the Supreme Court of Louisiana in the case of *Shuff* v. *Life & Casualty Insurance Company*, 164 La. 741, 114 So. 637, in which the Court said:

> "The plaintiff urges and relies upon the proposition that the *agent's knowledge* that the insured was not in sound health on the date of the policy and at the time when it was delivered was notice to the company, and that the agent did in fact waive the condition that the insured should be in sound health, and that the company was thereby deprived of the protection of that condition stated in the policy. The plaintiff's contention, therefore, stated broadly, is that, even though the insured was *aware* that the *agent* had no *authority* to dispense with or to *alter* any of the conditions of the policy, nevertheless the agent could confer the *authority* upon himself by merely disregarding *these conditions* and limitations expressed in the contract and known to the insured. The argument is not sound. It is the same as to say that it is *not competent* for an insurance company to *protect* itself against unauthorized acts of its agents by any condition or limitation of that kind expressed in its policy contracts. On the contrary, such limitations upon the authority of insurance agents are *not only reasonable* but *absolutely necessary* stipulations in a policy contract, to

protect the *investors of their money in such companies against unauthorized transactions between faithless or careless agents and unscrupulous or indifferent patrons.* There is no *reason of public policy* why such conditions and limitations in a policy of insurance should be *nullified* by the courts, or be declared invalid, or be incompetent to protect either party to the contract."

The above Louisiana case, page 661, also holds:

"There is a statute (Act 52 of 1906, as amended by Act 227 of 1916), which declares that every policy of insurance issued by a life insurance company doing business in this state 'shall contain the entire contract between the parties.' The statute was intended, manifestly, not so much to protect the insurance companies as to protect the *policyholders;* for the statute goes further and provides that nothing shall be incorporated in any life insurance policy by reference to any constitution, or by-laws, or rules, or the application for insurance, or any other writing, unless the same be *indorsed upon or attached to the policy when issued;* that all statements purporting to have been made by the insured shall, in the absence of fraud, be deemed representations and not warranties; that no statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless indorsed upon or attached to the policy when issued; and that any waiver of the provisions of the statute shall be void. There is *no reason,* however, why the statute, in so far as it declares that every life insurance policy shall constitute or contain the *entire* contract between the parties, should not be as effective in forbidding the *insured* as in forbidding the *company* to contradict the *written instrument* by *parol* or other *extrinsic* evidence. In *Fisett* v. *Mutual Life Insurance Co.,* 162 La., 620, 110 So. 880, it was held that the Act of 1916 was applicable as well to statements made in an application to establish a policy, or to place it in force after a

failure to pay the premiums within the time required, as to statements made in the original application for insurance."

Iannarelli v. *The Kansas City Life* (West Virginia), 171 S. E. 748:

"There is another reason of primary importance why contractual provisions of this sort in life insurance policies must be interpreted in the light of the phraseology employed and not in the light of extraneous consideration. Life insurance has come to occupy a most important field and to discharge an indispensable function in modern society.

"The life insurance companies are unable to function only on the basis of standard mortality and experience tables. These companies must comply with fixed requirements of State statutes. Neither the actuaries of the companies nor the Insurance Commissioners of the States could determine with any degree of definiteness the liability to which the companies might be subjected at any given date on account of outstanding insurance, if at the same time there are a large number of policies, supposedly lapsed and forfeited, under which there may be liability because of total disability of the insured at the time of the forfeiture, though the insurer had no notice of such disability.

"It must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion.

"It is like the forfeiture of shares in mining enterprises and other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the

whole scheme is endangered. The insured parties are associated in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the co-existence of many risks arises the law of average, which underlies the whole business.

"An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations again are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company."

Therefore, the company may do only the thing that the law says it may do, and only in the manner and way in which the law directs.

The corporation is, therefore, in legal effect only the agent or holding company or the trustee for the policyholders who are the owners of the assets and without any right in the company to exercise free agency or judgment in the manner in which the affairs shall be conducted. All it can do is to carry out the law as written under severe penalties.

The other policyholders are in effect interested parties in all law suits involving policies of the company, and are entitled to have these statutes construed so as to protect their rights.

This being the state of the law regulating your petitioners relation to the plaintiff and to other policyholders, it had no freedom of choice and could not exercise any free judgment

as to what it ought to do or not do when this claim was presented to it at Nashville, Tennessee, as stipulated in the policy.

All that it could do was to examine the claim to see whether or not it was payable under the statutes of Tennessee and Arkansas which required that the claim should show on its face that it was (a) an amount owed by the terms of the policy, and (b) that its payment would not result in a discrimination between policyholders of the same class. If the claim did not meet these two requirements your petitioner was required by these laws to reject it and its payment would have subjected your petitioner to conviction for a misdemeanor and to a cancellation of its license.

As aforesaid, prior to the issuance of this policy, the Tennessee Supreme Court in the Galbraith case had held that the terms of an insurance policy began to run anew from the date of the reinstatement and it will not be disputed that as to Tennessee policyholders this decision became binding and a part of the policy issued thereafter and that if presented by a Tennessee policyholder the claim would not be owed by your petitioner.

The policy provides on its face that the claim is payable at Nashville, Tennessee, and, accordingly, in determining whether or not it owed anything on the claim your petitioner had to apply the Tennessee law to it.

It is equally clear that if the company had paid this claim to a citizen of Arkansas which the law did not permit it to pay to a citizen of Tennessee, it would have constituted a dis-

crimination against the Tennessee policyholders in favor of the Arkansas policyholder forbidden by the above Tennessee statute.

Likewise, such a payment to an Arkansas policyholder which could not be paid to a Tennessee policyholder would be a discrimination under the above Arkansas statute inasmuch as the Arkansas statute does not limit the prohibition as to discrimination to citizens of Arkansas, but generally prohibits discrimination between policyholders of all States. Accordingly, the policy providing on its face under the Galbraith case that this claim showed death by suicide within one year of the reinstatement, the claim was one showing upon its face that this petitioner did not owe it and it was forbidden to pay it both by the Arkansas statute and the Tennessee statute.

Accordingly, under the law as laid down by this Court in the cases of *St. Louis Railroad Company* v. *Wynne*, 224 U. S. 360, 56 L. Ed. 801, and the Arkansas case of *Pacific Mutual Life Ins. Co.* v. *Carter*, 92 Ark. 378, 123 S. W. 384, the petitioner not owing the claim as demanded, no penalty could be awarded against it for its non-payment under the Fourteenth Amendment.

We make no point that 12% damages are excessive or that the attorneys' fees are unreasonable. Our point is that *no attorneys' fees* and *no damages* may be assessed where the claim at the *time demanded* shows that the company does not owe the claim.

This Court omitted to pass upon the merits of the case as contended in appellant's original brief stating "our jurisdic-

tion upon appeal from a judgment of a State Court does not permit us to review them."

This is manifestly in conflict with the case of *Scott* v. *Donald*, 165 U. S. 71, in which the Court said:

> "It is also argued that the amounts involved in the respective suits were not sufficient to give jurisdiction to the Circuit Court. Although the question of the jurisdiction of the court below has *not* been certified to us in the manner provided by the 5th section of the Judiciary Act of March 3, 1891, yet, *as the case is before us*, in a case in which the *law of a State* is *claimed to be in contravention of the Constitution of the United States*, under another clause of that statute, we have jurisdiction of the *entire case* and of *all questions involved in it*. *Horner* v. *United States*, 132 U. S. 570 (36:266); *Carey* v. *Houston & T. C. R. Co.*, 150 U. S. 181 (37:1044); *Chappell* v. *United States*, 160 U. S. 499 (40: 510)."

In these cases now before the Court, the Court has sustained its jurisdiction on the ground that it involved the claim that the Arkansas penalty statute was *in conflict with the Constitution of the United States* and *has passed on that question*. Accordingly, under the above authority, the merits of this case are now before the Court.

Also, in order to pass upon the questions herein raised that the claims as presented at the time of the demand were not owed, the decision on the merits is directly involved.

The authorities cited by the Court either do not relate to the questions here discussed, or the conclusion reached, except the case of *St. Louis, etc., Railroad Company* v. *Wynne*, 224

U. S. 354, hereinbefore mentioned, which holds that where the statute required a *demand before suit* and then demand shows the amount not due or owing, although suit may be brought without making another demand, no penalty can attach, under the Fourteenth Amendment. This case sustains our contention in every point and must be overruled if this petition is to be denied.

We concede, of course, that an insurance company has such a relation to the public as authorizes its regulation. As a matter of fact, our whole contention is based upon the proposition that they are not only regulated but that they are in a straight-jacket. The law directs in every way every step pertaining to their business.

We also concede that statutes may provide for the taxing reasonable attorney's fees as costs in cases, but we are sure that this Court will agree that a statute would offend the Fourteenth Amendment if it provided for attorneys' fees against the defendant when unsuccessful and not against the plaintiff when unsuccessful, unless the defendant occupied such a relation to the public as to give the defendant an unequal advantage. In the present case it has been seen that the real contest in insurance cases is not between the plaintiff and the company but between the plaintiff as one policyholder against the other policyholders who are owners of the assets and who will be directly affected by an unequal distribution not in accordance with their insurance policies.

All of these insurance laws, including the ones requiring that no claim shall be paid unless shown to be due by the written policy and where it discriminates against other policyholders of the same class, become a part of each insurance

contract, and the policyholder bringing suit has thereby agreed in its policy that he will not be entitled to draw out of this common fund any amount not shown by the written provisions of the policy and which discriminates against the other policyholders. Where such a policyholder as plaintiff in violation of his contract as created by these statutes brings a suit attempting to secure for himself a greater part of this common fund than his contract calls for and thereby subjects the common fund to the expense of the litigation, he stands upon the same footing as the other policyholders, and accordingly the Arkansas statute is unconstitutional as not placing the same burden upon the offending policyholder as it placed upon the common fund owned equally with the other policyholders. As we have before stated, the relation of the company to these matters is merely that of agent or trustee to see that the law regulating such matters including the distribution of the fund is faithfully and in good faith carried out.

The cases relating to penalties and damages against railroad companies are not applicable. The difference between a railroad company and an insurance company in this respect is that the relation of the railroad to the public is one-sided. While it owes the duty to pay just claims, it owns its own assets; it has the right to contract as it sees fit and to reject any claim and stand suit whenever it pleases. An insurance company's relation to the public is dual; it not only owes the duty to pay just claims, but the statutes of the different States specifically state what claims *are just and what claims are not to be paid.* The insurance companies have no freedom of judgment as to what contracts they make as their policies are purely statutory and must be approved by the Insurance

Departments before issuance, and must be carried out as written.

The cases of *Fidelity Mutual Association* v. *Mettler*, 185 U. S. 308, 325, 326, and *Iowa Insurance Company* v. *Lewis*, 187 U. S. 335, and *Farmers and Merchants Insurance Company* v. *Dodney*, 189 U. S. 301, involve the Texas statute imposing attorney's fees and penalty not exceeding 12% upon an insurance company relating to their failure to pay claims. If this Court will examine these cases again, it will see that this Court decided them upon two propositions, neither of which are involved in this case:

1. That an insurance company being a foreign corporation has no right in the State without the consent of the State and accordingly any condition whether constitutional or not may be imposed upon it. This view has been expressly overruled in *Terral* v. *Burke Construction Company*, 257 U. S. 529, and *Mortensen* v. *Security Ins. Co.*, Advance Sheets, U. S. Reports, Vol. 77, No. 11, 673.

2. That the contention that the attorneys' fees and damages could not be assessed against an insurance company on account of an unlawful classification was not sound because the insurance company differed from other corporations in its relation to the insuring public.

We are making no such contention as an insurance company's relation to the insuring public makes it subject to a different classification.

While these cases may have in a general way expressed an approval of the opinions of the Texas Court, such observations were not pertinent to the points ruled on by this Court.

ALBERT BAREFIELD CASE

What we have said heretofore has been particularly applied to the facts in the McCray case, but they are equally applicable to the facts in the Barefield case. The claim as demanded before the suit was filed in the Barefield case showed that your petitioner owed nothing because the claim did not come within the written provisions of the policy, and, while the stipulation in this case states that the policy was an Arkansas contract, this point is not material because the law of Arkansas and of Tennessee are the same as applied to these facts. The policy in the Barfield case expressly provided that there would be no liability under the policy unless the accident to the automobile left some "external or visible injury on the vehicle of the collision or accident." The claim as demanded did not show that there was any external or visible injury to the automobile. The declaration as filed did not aver that there was any visible or external injury to the automobile. The stipulation did not set out that there was any external or visible signs of the injury to the automobile.

Consequently, the claim did not come within the terms of the policy. The Arkansas Supreme Court held that this provision while valid was an excepted cause and consequently the burden of proof was upon the defendant to show the negative fact of no external or visible injury to the automobile. Manifestly this position is not sound. The case being heard upon stipulation, the question of burden of proof was not involved. The parties had agreed upon certain facts and submitted to the Court those facts on the question of liability under the policy, and all the Court could consider was those facts as set out in the stipulation. The law presumes that in

making up stipulations and submitting them to a Court for determination that each has placed therein every fact available, and where a fact is omitted the presumption is that no such fact existed. (*Birmingham Post Company* v. *Sturgeon* [Ala. Supreme Court] , 149 So. 74, No. 1, Advance Sheets, July 27, 1933.)

Accordingly the claim as presented at the time of the demand not showing a visible or external injury on the automobile, did not show that it was owed by your petitioner, and under the statutes heretofore set out, it would have been unlawful for your petitioner to pay it.

Also owing nothing on the claim at the time of the demand, under *St. Louis, etc., Railroad Company* v. *Wynne*, 224 U. S. 354, and *Pacific Mutual* v. *Carter*, 92 Ark. 378, no award for attorney's fees and damages could be awarded under the Fourteenth Amendment.

SUMMARY

1. This Court has held in *St. Louis, etc., Railroad* v. *Wynne*, supra, and *Pacific Mutual Life* v. *Carter*, supra, that where a statute provides that a demand must be made as does the Arkansas penalty statute, the Fourteenth Amendment forbids the award of attorney's fees and penalties for failure to pay the claim if the claim as demanded shows that the company does not owe it. In other words, whether or not the refusal was wrongful depends upon whether or not at the time of the demand the claim presented showed an amount owed by the company. This is our exact contention in these cases.

2. Insurance is an exact science made possible by the phenomena of human experience that so many deaths and so

many accidents will occur under given circumstances, which have enabled actuaries to figure definitely insurance tables adjusting the premium charged to the liability covered. In order to carry out the science of insurance it is necessary to create insurance reserves by charging more than sufficient to cover current losses and these reserves, constituting substantially the entire assets of an insurance company, *belong to the policyholders.* It would defeat the entire scheme of insurance if the law permitted one policyholder to be paid out of this reserve fund more than his policy entitled him to and consequently each State has passed laws regulating not only the payment of claims but the manner and means of distribution, how the reserves shall be created, and generally an entire regulation of insurance business. These laws must necessarily apply to the policyholders generally over the different States and none of them limit their application to the citizens of one State. These insurance laws become a part of each policy and accordingly each policyholder *agrees* that he will *pay* into this general fund to a *certain proportion* and that he will *draw out* of this common fund in a *certain proportion.* Whenever a policyholder brings suit demanding more than his policy calls for, he is violating his agreement as evidenced by these insurance laws. He is charged with knowledge not only of what his policy contains but also the meaning of his policy with these laws read into it. Accordingly, it is unfair to the other policyholders, and actually forbidden by these statutes, for the company to pay out to such policyholder amounts not due, that is, more than is due, or an amount not owing under his written policy. Accordingly, the real controversy in every insurance law suit is not between the policyholder suing and the company, but between *such policyholder* and *every other policyholder* of the company, which is merely a holding agency or trustee for the distribu-

tion of the reserve funds under these fixed and inflexible statutes.

3. This Court ought to pass upon the merits of these two cases (a) because it is necessary to determine whether or not the claim as demanded was owed by the company. If as demanded it was owed, then the application of the penalty and attorneys' fees was proper. If it was not owed at that time, the Fourteenth Amendment forbade the addition of attorneys' fees and damages. Accordingly the merits were directly involved in this constitutional question. (b) This Court has held in *Scott* v. *Donald,* 165 U. S. 71, that where the constitutionality of a State statute is involved the merits of the case, and every question in it, are before the Court for determination. In these cases the Court has sustained the proposition that the constitutionality of the Arkansas penalty statute is directly involved, and accordingly under the above cases the merits of the question are also before the Court.

4. On the merits of the question in these cases, we say that in the McCray case the claim as demanded showed no amount due because the suicide occurred within one year from the date of the reinstatement, and the policy provided expressly on its face, reading into it the interpretation of the Tennessee Supreme Court in the Galbraith case, that suicide within one year from the date of the reinstatement precluded recovery.

In the Barefield case the claim as demanded showed no amount owed under the policy because it failed to show that the accident left an *external or visible* sign on the automobile. This provision of the policy is just as essential as any other in order to keep the premium charged

within the liability under the policy, and it can no more be disregarded than may any other provision of the policy.

5. In the case of *Woodson* v. *Railroad*, 134 U. S. 614, this Court held that the judgment of the Supreme Court of Tennessee was void and unconstitutional under the Fourteenth Amendment because there was no evidence in the record to support it, and in the McCray case the only evidence was the policy, the fact that the assured committed suicide within one year from the reinstatement and the Tennessee and Arkansas Statutes forbidding the payment of claims not coming under the written policy and which discriminated between policyholders of the same class. This shows no evidence of liability whatever. In the Barefield case the only evidence was the policy, the death of the party in an automobile accident, with absolutely no evidence that there was any external or visible signs of injury to the automobile as required by the policy. Accordingly, there is no evidence whatever of liability.

If the Woodson case is to be given application, these cases certainly come within the law as therein set out.

6. At the time that the demand was made in the McCray case the Supreme Court of Arkansas had not passed upon the question of whether or not a reinstated policy became a new contract and that all of its terms began to run anew from the date of the reinstatement and not the date of the policy. The cases of *New York Life Ins. Co.* v *Adams*, 151 Ark. 123; *Security Life* v. *Leeper*, 171 Ark. 77, and *Equitable Life* v. *King*, 178 Ark. 293, did not discuss this proposition at all but held that where a policy lapsed and was reinstated the company had no right to add new conditions in the reinstatement.

Accordingly, the only case on the question at that time was the Galbraith case, which of course was binding upon your petitioner. The fact also is that the policy on its face (Record page 4) shows that the demand must be made at Nashville, Tennessee, and, of course, the Tennessee law would govern your petitioner and compel a rejection of the claim, as petitioner is a Tennessee corporation.

7. The fact that a judgment is rendered on a policy has no bearing on the application of the Arkansas penalty statute. While a statute requires that a demand be made before suit the law does not hold the claimant to the facts set out in the demand, but he may shift his ground entirely and may even deny the facts set out in the demand. The law does not require the claimant to make a new demand after the first is refused nor to alter or amend it. Consequently, the claimant may make the demand and when it was refused, sue on an entirely different state of facts and recover. This is manifestly contrary to the Fourteenth Amendment as the company has not been given the opportunity to pay the claim upon which the judgment is based.

This was expressly held by this Court in the case of *St. Louis Railroad Company* v. *Wynne*, supra, and by the Supreme Court of Arkansas in the case of *Pacific Mutual Life* v. *Carter*, supra.

8. The judgment of the Arkansas Supreme Court is void and unconstitutional under the Fourteenth Amendment as it is without power to render a judgment, the enforcement of which compels your petitioner to violate the above statutes

of Tennessee and Arkansas by paying claims not shown by the written policy and the payment of which would discriminate between policyholders of the same class, and which would subject your petitioner to a conviction for misdemeanor and to have its corporative existence ended and to have its license cancelled.

It may be that such judgment would be a protection against it in Arkansas but it certainly would not be a protection against it in Tennessee where it is incorporated or in the other States where it does business. It would be a gross injustice and a denial of their constitutional rights of the other policyholders if the Supreme Court of Arkansas were permitted to favor the citizens of Arkansas by compelling by judgment and execution, the payment to its citizens amounts under their policies which are not provided or authorized by the written policy and which would discriminate against policyholders of the other States. This would be permitting the citizens of Arkansas to receive out of the reserve funds of your petitioner amounts not shown by their written policy and which constitute a discrimination against other policyholders. The result of this would be the entire disruption of the science of insurance.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgments, upon further consideration, be reversed.

These two cases are included in one petition under the authority of a letter received from the Clerk of this Court under

date of March 12, 1934, advising that this was permissable under the rules of this Court.

All italics are ours.

Respectfully submitted,

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Life & Casualty Insurance
Company of Tennessee.

I, Moreau P. Estes, counsel for the above-named petitioner, Life & Casualty Insurance Company of Tennessee, do hereby certify that the foregoing petition for a rehearing of these causes is presented in good faith and not for delay, and that a copy of this petition has been mailed, with postage paid, to adversary counsel.

MOREAU P. ESTES,
Counsel for Petitioner.